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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 643

JAMES A. NOE, HARRY ALLSMAN, RAYMOND F. HUFFT, AND JAMES A. NOE, JR., d b a JAMES A. NOE & COMPANY, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*

LOYOLA UNIVERSITY (*Intervenor Below*)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WARREN WOODS
EDWARD G. VILLALON
716 Perpetual Building,
Washington 4, D. C.
Attorneys for Petitioner

WILSON, WOODS & VILLALON
716 Perpetual Building
Washington 4, D. C.
Of Counsel.

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OPINIONS BELOW

The decision of the Federal Communications Commission released July 13, 1956 is printed at Joint Appendix pp. 377-542. The Memorandum Opinion and Order denying Petitions for Rehearing is printed at Joint Appendix pp. 543-551. The opinion of the Court of Appeals for the District of Columbia Circuit is reported at — F. 2d —, and is set out in Appendix A, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on October 16, 1958 (Appendix A, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254 (1).

QUESTION PRESENTED

Whether Loyola University, by reason of its connection with the Society of Jesus, is the "representative" of an "alien" and is a corporation whose stock is "owned of record or voted" by "representatives" of aliens, within the meaning of Section 310(a) of the Communications Act of 1934, 48 Stat. 1086, as amended, 47 U.S.C. 310(a) (1952), rendering it ineligible to hold a television license?

THE STATUTE INVOLVED

The single statutory provision out of which this controversy arises is Section 310(a) of the Communications Act of 1934, 48 Stat. 1086, as amended, 47 U.S.C. # 310(a) (1952). The pertinent portion of the text of Section 310(a) recites as follows:

> "(a) The station license required hereby shall not be granted to or held by—
>
> "(1) Any alien or the representative of any alien;
>
> "(2) Any foreign government or the representative thereof;
>
> "(3) Any corporation organized under the laws of any foreign government;
>
> "(4) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a

foreign government or representative thereof, or by any corporation organized under the laws of a foreign country;

"(5) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted, after June 1, 1935, by aliens, their representatives or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or the revocation of such license."

Section 3 (j) of the Act which defines terms used in the Act, unless the context otherwise requires, states:

"(j) 'Corporation' includes any corporation, joint-stock company, or association."

STATEMENT OF THE CASE

This case involves a specific statutory prohibition against alien control of radio and television facilities. It is not merely another case seeking Supreme Court review of the limits of the discretion allowable to the Federal Communications Commission in awarding a television channel to one of several competing applicants. It presents the question directly of whether a non-profit educational and religious corporation composed of priests who are members of the Society of Jesus is an alien or representative of an alien or is a corporation whose stock is owned of record or voted by representatives of aliens within the meaning of Section 310(a) of the Communications Act of 1934, as amended, thus rendering it ineligible to hold a television license.

Petitioner, James A. Noe & Company, is a partnership formed in 1953 for the purpose of seeking authority from the Federal Communications Commission to construct a television station using channel 4 in New Orleans, Louisiana. (J.A. 465)

Because there were two other applicants, the Times-Picayune Publishing Company and Loyola University, applying for the same channel, the Commission designated the three applications for consolidated hearing. In its Order designating the applications for hearing the Commission found that Loyola University was financially, legally and technically qualified to hold a television license and established as hearing issues the question of Noe & Company's financial qualifications and on a comparative basis which applicant's proposal would best serve the public interest, convenience and necessity. (J.A. 378-379)

At the hearing the Examiner ruled that while she would not hear evidence offered for the purpose of proving that Loyola was not legally qualified, she would receive evidence dealing with the relationship of Loyola University, a non-profit educational and religious corporation, and the Society of Jesus, on the theory that such evidence was relevant to the question of whether Loyola University was controlled by the Society. She reasoned that the question of control had relevance in the evaluation of the comparative criteria of preference as between applicants.

The record thus discloses the essential facts upon which the argument that Loyola University is not legally qualified to hold a license is based.

Loyola University is an educational corporation chartered by the State of Louisiana in 1912. It is a

non-profit, non-stock corporation; it has no shares. Under the corporate charter its directors must be priests of the Society of Jesus attached to Loyola University. (J.A. 677) Administration of the corporation is vested in the Board of Directors which consists of a President, Vice-President, a Treasurer and a Secretary "and not less than one or more than three other members of the Corporation, who shall be appointed by the President of this Corporation from among the members of the Corporation." (J.A. 387) The President is virtually all-powerful since the charter provides that "All legal acts of this Corporation shall be decided by a majority vote of the members present, provided such acts have the approval of the President of the Corporation." (J.A. 387) In the event of the death of any member of the corporation, his heirs or assigns shall have no right of ownership in the property or effects of the corporation. (J.A. 389) The same result occurs if any member of the corporation ceases to be a member "for any reason whatever," presumably including transfer to another religious community or expulsion from the Society of Jesus. (J.A. 389)

The Society of Jesus, of which every member of the Board of Directors of Loyola University must also be a member, is a voluntary association of Roman Catholic priests founded in 1540. The administration of the Society is by provinces. Within the provinces individual corporations are created for the purpose of operating churches, schools, colleges, etc. Loyola University is within the Southern, or New Orleans Province which geographically extends from South Carolina to New Mexico. (J.A. 85) Total membership in the Society is about 32,000 of whom about 7,500 reside in the United States, approximately 350 to 400 in the New Orleans province and 42 in the New Orleans

religious community of which Loyola University is a part. (J.A. 573) As a hierarchical organization control of the affairs of the Society is vested in a Superior General with headquarters in Rome, Italy. The present incumbent is a citizen of Belgium. (J.A. 579, 589) Final authority to expel a member from the Society rests with the Roman Catholic Pope at Rome. (J.A. 574) The general practice is that a Rector of a religious community will not serve more than two consecutive three-year terms in any one post. (J.A. 599) Members of the Society may not own property or stock in corporations. (J.A. 585)

The power of the Society of Jesus through its Superior General and hierarchical organization to control Loyola University derives from the fact that the head of the religious community at Loyola—The Rector—is *ex officio* the President of the University and corporation. He is appointed as head of the religious community by the Superior General. The Rector has the power to appoint one to three members of the Board of Directors and to submit a list of names to the Provincial Superior, from which list the latter appoints the other three leaders of the religious community, who *ex officio* become officers of the corporation and members of the Board. While the Provincial Superior is at the present time an American citizen he is himself appointed to his position by the Superior General in Rome, a Belgian citizen. (J.A. 677-678) Thus every priest who is an officer or director of Loyola University or who can become an officer, director or member of the Loyola University corporation owes his position either to direct appointment by the Superior General, a Belgian citizen in Rome, Italy, or to appointment by a person appointed to his own position by the Superior General.

On the basis of these and other facts not now pertinent the Hearing Examiner in a decision released July 7, 1955, recommended grant of a construction permit to the newspaper applicant, Times-Picayune Publishing Company, and the denial of the applications of Noe & Company and Loyola University. In her decision she found that "control by the Society of Jesus over the selection, appointment and tenure of the officers and directors of Loyola has been clearly established . . ." and noted that "this is not due to any provision of canon law but to the express provisions of the charter of Loyola granted by the State of Louisiana at the request of the incorporators of Loyola." (J.A. 347-348).

By decision released July 13, 1956 (J.A. 377-542), the Commission reversed the Hearing Examiner's Initial Decision, denied the applications of both Noe & Company and the Times-Picayune, and granted the application of Loyola. In reaching its conclusion the Commission found it unnecessary to consider the jurisdictional issue of the legal qualifications of Loyola under Section 310(a) because in its view the issue had not been presented "in the manner prescribed by the Rules of the Commission." (J.A. 381). In its Memorandum Opinion and Order released July 1, 1957 (J.A. 543-551), denying Petitions for Rehearing, the Commission made no further reference to the jurisdictional argument.

Thus the issue of the legal qualifications of Loyola University under Section 310(a) to receive and hold a television license was for the first time considered on its merits by the Court of Appeals.

Jurisdiction of the United States Court of Appeals for the District of Columbia Circuit was invoked under

Section 402(b)(1) and 402(b)(6) of the Communications Act of 1934, as amended (47 U.S.C. Secs. 402(b)(1) and 402(b)(6)) and Rule 37 of the Rules of that Court.

On the basis of very limited selections from the legislative history of Section 310(a) the Court of Appeals held that although the Section was directed against alien control of our communications facilities, this prohibition was primarily based upon the idea of preventing alien activities against the Government during time of war. It found that the relationship of Loyola to the Society of Jesus "hardly seems to endanger our national security." (J.A. 679) The Court said that even though it recognized the Society of Jesus was a hierarchical organization and that within the organization some power and control is vested in persons not directly a part of the University and a few of whom reside abroad, nevertheless this control has never been used in the past "to impinge on the independence of the University in the operation of its radio station." (J.A. 679)

Hence, since Section 310(a) was put in the Act to guard against alien control and not the mere possibility of alien control, the Court concluded that Loyola "seems to us to fall neither within the letter nor the spirit of the statute." (J.A. 680)

The Court also found no impropriety in the Commission's differentiation between Loyola as an educational and religious organization and the "usual business corporation, in applying its customary comparative criteria." While in business corporations the power to appoint and promote might require consideration of the appointing authority as a principal, the court felt

that a distinction was justified when dealing with an ecclesiastical hierarchy. (J.A. 680)

This petition is filed seeking review of the erroneous decision of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. This case presents an important question of federal law regarding foreign influence in communications which has not been, but should be settled by this Court.

Never before in the history of the Communications Act has this court or any other federal court (except in the present case) been called upon to interpret and apply the provisions of Section 310(a) in connection with ownership or control of communications facilities in this country by organizations based outside this country.

It is true that the Federal Communications Commission has on many occasions licensed non-business organizations. The Court of Appeals decision cites five such cases involving respectively a municipal corporation, the Baptist General Convention of Texas, Reorganized Church of Jesus Christ of Latter Day Saints, a non-stock, non-profit trade union-owned corporation and a college controlled by a Board of Trustees. (J.A. 680) Intervenor's Brief below pointed out that in the field of television, the Church of Jesus Christ of Latter Day Saints owns 63.5 percent of the stock of the licensee of KSL-TV in Salt Lake City, 40% of the licensee of KID-TV in Idaho Falls, Idaho, and 5.5% of KBOI at Boise, Idaho. Moody Bible Institute of Chicago, the Christian Catholic Church of Chicago, the Boone Biblical College of Boone, Iowa, University of Notre Dame, and the Lutheran Church-Missouri Synod of St. Louis are other examples of religious organization licensees.

James A. Noe, Sr. of Noe & Company purchased a radio station in New Orleans many years ago which was licensed to the Coliseum Place Baptist Church. See *James A. Noe,* 3 Pike & Fischer, R.R. 1821.

The significant fact, however, is that in all of these cases either the issue of alien ownership or control was not raised, or on the only occasions that it was raised the Commission ruled against the church applicant, at least until the time of its decision in this case.

For example, in *Utah Radio Educational Society,* et al., 3 F.C.C. 246, 255 (1936), the Commission rejected the application of an unincorporated association because the names of all the members composing the Association did not appear of record and therefore it was impossible to determine their citizenship. In *Kansas City Broadcasting Company,* 5 Pike & Fischer, R.R. 1057 (1952), cited by the Court of Appeals in its decision, the Commission rejected the application of a church group because one of the 18 members of its governing board was not a United States citizen. The Commission held in that case that the purpose of Section 310(a) of the Act was to "safeguard the United States from foreign influence in the field of radio . . ." and not solely to prevent "alien activities against the Government during time of war." *Id.* at 1093. It said that it was immaterial in other cases where the issue did not arise that licenses or license renewals may have been granted to unincorporated associations without proper proof of citizenship.

Indeed, in a case involving a business corporation, *Re Crosley, Jr. et al.,* 11 F.C.C. (1945), where the Commission was asked to approve transfer of a license from the Crosley Station (WLW) to the Aviation Corporation, it withheld its approval until more than 40,000

stockholders were polled in order to determine whether Section 310(a)(5) limiting aliens to ownership of not more than 25% of the stock, had been complied with.

The only court references to Section 310(a) which we have been able to find appear as *dicta* in two decisions of the United States Court of Appeals for the District of Columbia Circuit. In *Storer Broadcasting Co. v. F.C.C.*, 220 F. 2d. 204, 95 App. D.C. 97 (1953), while discussing when a hearing is required under the Act, the Court commented that there are situations when the Commission may reject an application without a hearing, as, for example, an application submitted by an alien or one found to be an alien after hearing and denial of alien status. Also in *WOKO, Inc. v. F.C.C.*, 153 F. 2d 623, 80 App. D.C. 33, the Court observed as dicta:

> "Subject to the specific provisions against the ownership or holding of radio station licenses by aliens, foreign governments *or corporations which have an alien tinge through stock ownership*, the Act simply directs the Commission to grant or remove a license if it shall find that the public interest, convenience, or necessity will be served thereby. (Emphasis Supplied)

We do not present the issue of Loyola's eligibility under the statute to hold a television license as either a religious or church issue. We are not here questioning the jurisdiction of the Commission to grant a license to some other church or trade union or other religious or educational group, incorporated or unincorporated, non-profit or profit-making, under circumstances where ownership or control of the group is vested in American citizens. The legal issue is no different than if the applicant were a corporate creation of a labor organi-

zation having some members in the United States but its headquarters and a majority of its membership outside the United States.

We submit the determination of this question by the Supreme Court is of paramount importance to the communications policy of the United States. The United States is one of the few countries in the world which permits any operation of communication facilities, including broadcasting by private enterprise. Until now it was assumed that the regulatory system required that ownership and control of the facilities not be in the hands of non-citizens. If an exception to this requirement is to be made in favor of any corporation or other legal entity owned and controlled in perpetuity by changing groups of members of an alien-controlled Society assigned to their posts by the Society, we think this Court should spell out the reasons for making the exception.

II. The Court of Appeals has judicially legislated an amendment to Section 310(a) of the Communications Act of 1934 which would make the Section prohibit alien ownership or control only when in the judgment of the Court or the Commission such ownership or control would endanger national security.

In the Court of Appeals petitioner argued that Section 310(a) was so clear and explicit in its prohibition of the holding of licenses by aliens or representatives of aliens or by corporations whose stock is owned of record or voted by aliens or their representatives that there was no occasion to resort to legislative history as an aid in the interpretation of an ambiguous statute. In this connection we pointed out that the Court of Appeals in the *WOKO, Inc.* case, *supra*, had mentioned the prohibition against the holding by aliens, foreign govern-

ments or "corporations which have an alien tinge through stock ownership . . ." and that the Commission's opinion in *Kansas City Broadcasting Co., supra*, had noted that the purpose of the Section was "to safeguard the United States from foreign influence in the field of radio."

The Court of Appeals ruling disagrees, holding that petitioner's emphasis was "misplaced." (J.A. 678) The opinion then selects two isolated items of evidence put into the record of the House Interstate and Foreign Commerce in 1934 preceding the passage of the Communications Act of 1934 and from this evidence concludes that "although Section 310(a) was directed against alien control of our communications facilities, this limitation was primarily based 'upon the idea of preventing alien activities against the Government during the time of war.' 68 Cong. Rec. 3037 (1927)" (J.A. 679) Since, in the opinion of the Court, the relationship of Loyola to the Society of Jesus "hardly seems to endanger our national security," then even if Section 310(a) "be thought to have a semblance of relevance to the present case, it nevertheless would be inapplicable since it was incorporated into the Communications Act "to guard against alien control and not the mere possibility of alien control.' S. Rep. No. 781, 73d Cong., 2d Sess. 7 (1934)." (J.A. 679-680).

In this fashion the Court of Appeals reads into the language of the 1934 Act both an intention to weaken, rather than strengthen, the prohibitions against alien control which had previously existed and a primary statutory purpose of prevention of alien activities during time of war. We believe a careful reading of the legislative history will not support either premise of the Court of Appeals opinion. Not even Intervenor

went so far as to argue that the Congressional purpose in the enactment of Section 310(a) was limited to the prevention of alien activities against the Government during time of war. It conceded the section came into the Act because "... our government still wishes to keep communications out of the hands of non-citizens." (Intervenor's Brief, pp. 9-10), and then argued that Loyola as a domestic corporation whose officers and directors are American citizens, is not, in the legal sense, controlled by the Society of Jesus, and hence the requirements of Section 310(a) can be disregarded.

To understand how completely the Court of Appeals misunderstood the legislative history of Section 310(a), however, it is necessary to review the evolution of Section 310(a) into its modern form in the Communications Act of 1934. It will then be seen that the language "guard against alien control and not the mere possibility of alien control" meant that the statute was changed in 1934 to eliminate a permissive clause and make it mandatory to deny a license to any corporation, under Section 310(a)(4) whose stock is owned or voted by representatives of aliens.

The Ship Act of 1910[1] was the earliest Congressional legislation concerning radio communications. This Act made it mandatory that passenger ships be equipped with radio apparatus. It was soon followed by the Act of 1912[2] which was passed by Congress in pursuance of the International Radiotelegraph Conventions of Berlin and London. At that time broadcasting did not have the commercial significance it has since acquired and the Act was primarily designed to foster radio-

[1] 36 *Stat.* 629 (1910); 46 U.S.C.A. #484 (1928).

[2] 37 *Stat.* 302 (1912); 47 U.S.C.A. #51-54 (1928).

telegraphy, but the Act required that any applicant for a license in the area covered by the Act must be either a citizen of the United States or a corporation formed under the laws of a state or territory thereof.[3] The purpose was obvious and independent of any wartime experience: Congress wanted to keep communications out of the hands of non-citizens.

With the growth of the radio broadcasting industry Congress moved in 1927 toward more adequate regulation of the new industry and in the Radio Act of 1927 established by statute a Federal Radio Commission with certain powers to regulate radio broadcasting.[4] Section 12 of this statute not only required that an applicant be a citizen of the United States; it also provided that no license could be granted or transferred to an alien person or corporation and that no domestic corporation could hold a license by grant, transfer or otherwise, if any officer or director were an alien or if one-fifth of the voting stock "may" be voted by an alien interest.

Where the Act of 1927 applied only to shares of stock which "may" be voted by aliens or representatives of aliens, the Communications Act of 1934 which overhauled the 1927 Act, was much more stringent and restrictive. It removed the permissive "may" and in its place in the present Section 310(a)(4), substituted specifically the words "owned of record or voted" for the previous reference to shares of stock "which may be voted" by aliens or their representatives. The substitution was intended to strengthen, not weaken the prohibitions against alien influence in the communications field. The full text of the paragraph in *Senate Report*

[3] Id. at Section 52.

[4] Act of Feb. 23, 1927, 44 *Stat.* 1162.

No. 781, 73d Cong. 2d Sess. 7, (1934) in which the words "guard against alien control and not the mere possibility of alien control" appear, reads as follows:

> "Section 310(a)(4) modifies the present law by (1) refusing a station license to a company more than one-fifth of whose capital stock is owned of record by aliens, and (2) by changing the words 'may be voted by aliens' in the present law to 'is voted by aliens'. The purpose of this is to guard against alien control and not the mere possibility of alien control."

Thus the mere fact of ownership of stock by aliens or their representatives was enough to disqualify an applicant under the new law, regardless of how the stock was voted, whereas under the 1927 statute only the possibility of voting owned stock disqualified. Stock might be owned under voting trust and other protective arrangements, preventing its being voted. Now, however, ownership alone was to disqualify.

Similarly we think the Court of Appeals has misunderstood the real meaning of the Secretary of Navy's letter of March 22, 1932, from which it quotes a single excerpt as authority for finding that the primary basis for Section 310(a) of the Statute was the idea of preventing alien activities against the government in time of war. (J.A. 678) The excerpt itself refers to two primary bases, not one. These are "the lessons the United States had learned from the foreign dominance of the cables" *and* "the dangers from espionage and propaganda disseminated through foreign-owned radio stations in the United States prior to and during the war." The Secretary of Navy was concerned with both non-war and war experience. He made this evident in the very next paragraph of his letter following the

excerpt quoted by the Court of Appeals, the first sentence of which reads:

> "The great nations of the world fully realize the tremendous importance, *both to commerce and national defense*, of owning and controlling their own radio systems." *Hearings on H.R. 8301 Before the House Committee on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 26 (1934). (Emphasis supplied)

Later on in his letter he explained again:

> "With these points in mind—commercial and national defense—and realizing the foreign dominance in cables, it must be apparent that no truly international communication system is possible. Nations will not agree to the relinquishing of their leadership in any branch of the field when such factors may affect adversely their *commerce or national defense*. (*Id.* 26-27) (Emphasis supplied)

He looked with "apprehension" on any legislation which permitted communications companies in this country "to be subject to foreign influence." It will be noted that he stressed "subject to foreign influence" and not the ultimate fact of exercise of foreign influence in a manner inimical to the national security.

The second excerpt from the legislative history which the Court cites in support of its view that the primary basis for Section 310(a) was to prevent alien activities against the Government during time of war, involves the testimony of a Captain Hooper, then Director, Communications Division, Office of Naval Operations, who had read the Secretary of the Navy's 1932 letter into the record of the House Committee. The particular comment which the Court of Appeals decision

quotes (J.A. 679) had to do primarily with Section 310(a)(5), the holding company provision, and not with Sections 310(a)(1) and (4). This is apparent from the next two sentences following the sentences quoted by the Court, which read:

> "Now we find that there is a loophole in the law which permits a holding Company not conforming to the original intent of the law to own many foreign and domestic subsidiaries and employ foreigners, although the domestic subsidiaries may themselves comply with the law. I fail to see how this can be proper because if a holding company owns the subsidiary, it dominates its every act." *Id.* 23

Later on in his testimony Captain Hooper made it inescapably clear that his fundamental purpose was "to divorce private radio *absolutely* from foreign control and influence." *Id.* 24. He stressed that ". . . all great nations today insist on 100-percent control of their radio communications, as radio is so vital to *commerce, international relations,* and *national defense* that the communications of such nations are considered by them to be sacred." *Id.* 27 (Emphasis Supplied).

We did not contend in argument before the Court of Appeals or before the Federal Communications Commission that ownership of a television license by Loyola University would endanger the national security. This is a question which is wholly beside the point in this case. Few countries are more closely allied with the United States than Canada in the national security area. It would be almost inconceivable to imagine a situation in which Canadian ownership of a television facility in the United States would endanger our national security. Yet clearly Canadian ownership or control of a television channel in the United States,

except in the percentages permissible under the statute, is prohibited. The point is that Congress did not intend in this statute to leave it to the discretion of the Commission or the Courts to decide in each case involving a foreign influence whether that influence would endanger the national security. Congress legislated on the basis that any holding of a television license by aliens or their representatives or by corporations in which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives was *per se* contrary to the public interest. We wanted to preserve 100-percent control of communications facilities in our own government because these communications are vital to commerce, international relations and national defense.

Is Section 310(a) any less applicable to Loyola University because the University is a non-profit, non-stock corporation? Again the statute is explicit in Section 3(j): the term "corporation" means *any* corporation, joint-stock company, or association.

Finally, are the officers and directors of Loyola University aliens or their representatives? Obviously the American citizens who today comprise the Board of Directors of Loyola are not aliens. But they are and must be to qualify for their positions Jesuit priests subject to the almost military disciplines and hierarchical control of the Order. The Order's membership is dominantly foreign, only 7,500 of its 32,000 members being American citizens. The individuals who appoint the officers and Board are themselves appointed by the Superior General in Rome, who is a Belgian citizen. Even if the Superior General were an American citizen, however, the predominantly foreign complexion of the Order given it by its membership and

organization would not be changed. Any member of the Board of Directors may be removed from office immediately by the simple expedient of his expulsion from the Order or transfer to another assignment on orders initiated from abroad. Loyola University is in every sense the child of the Society of Jesus, created by the Society, controlled by the Society and in the property sense owned by the Society since no other person or group can exercise property rights in the corporation.

The fundamental error of the Court of Appeals is that on its own initiative it has read into an otherwise clear statute an amendment which permits the Court to ignore the statute upon a judgment that a specific alien-controlled organization does not now endanger our national security. This is error—and serious and important error.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for certiorari should be granted.

WARREN WOODS
EDWARD G. VILLALON
716 Perpetual Building,
1111 E. Street, N. W.
Washington 4, D. C.
Attorneys for Petitioner

WILSON, WOODS & VILLALON
716 Perpetual Building
Washington 4, D. C.
Of Counsel.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,064

JAMES A. NOE, HARRY ALISMAN, RAYMOND F. HUFFT, AND JAMES A. NOE, JR., d/b/a JAMES A. NOE & COMPANY, *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*,
LOYOLA UNIVERSITY, *Intervenor*.

On Appeal from the Federal Communications Commission.

Decided October 16, 1958

Mr. Warren Woods for appellant.

Mr. Joel Rosenbloom, Counsel, Federal Communications Commission, with whom *Messrs. Warren E. Baker*, General Counsel, Federal Communications Commission, *Richard A. Solomon*, Assistant General Counsel, Federal Communications Commission, and *Richard M. Zwolinski*, Counsel, Federal Communications Commission, were on the brief, for appellee.

Mr. Paul M. Segal, with whom *Mr. Robert A. Marmet* was on the brief, for intervenor.

Messrs. Glenn L. Archer and *James E. Curry* filed a brief on behalf of Protestants and Other Americans

United for Separation of Church and State, as *amicus curiae*, urging reversal.

Before BAZELON, FAHY and WASHINGTON, Circuit Judges.

WASHINGTON, *Circuit Judge:* This appeal arises from a comparative proceeding before the Federal Communications Commission to determine which of three applicants should be awarded authority to operate a commercial television station on VHF Channel 4 in New Orleans, Louisiana. The hearing examiner recommended a grant to the Times-Picayune Publishing Company, preferring it over appellant James A. Noe & Company and over intervenor Loyola University, a Jesuit educational institution in New Orleans. The Commission, after hearing argument en banc, awarded the license to Loyola University. Each of the disappointed applicants appealed, but the appeal now before this court is that of James A. Noe & Company.[1]

The primary contention of appellant Noe is that Loyola, by reason of its connection with the Society of Jesus, is the "representative" of an "alien," and is a corporation whose stock is "voted" by "representatives" of aliens, within the meaning of Section 310(a) of the Communications Act of 1934, 48 STAT. 1086, as amended, 47 U.S.C.

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[1] The appeal of the Times-Picayune Publishing Company, No. 14,067, was consolidated with the instant appeal, No. 14,064, for purposes of briefing and argument. After argument, while both appeals were under advisement, the appeal of Times-Picayune was withdrawn, pursuant to an undertaking it had given to the Department of Justice in connection with an anti-trust problem, and was dismissed with the consent of the parties, by order of this court.

§ 310(a) (1952), rendering it ineligible to hold a television license.[2]

Briefly, the record shows that the Society of Jesus is an order of Roman Catholic priests, with a total membership of some 32,000, of whom about 7,500 reside in the United States. The record also shows that Loyola is an educational corporation chartered by the State of Louisiana in 1912. It is a non-profit, non-stock corporation; it has no shares. Its property is its own, possessed in trust for educational purposes. It is legally and financially autonomous; it does not support or receive support from the Society of Jesus in a monetary way. Under the corporate charter, its directors must be priests of the Society of Jesus attached to Loyola University. All the directors are American citizens. The head of the Jesuit religious community at Loyola—the Rector—is ex officio the President of the University and corporation, and a

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[2] The pertinent portion of the text of Section 310(a) recites:

"(a) The station license required shall not be granted to or held by—

"(1) Any alien or the representative of any alien;

"(2) Any foreign government or the representative thereof;

"(3) Any corporation organized under the laws of any foreign government;

"(4) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;

"(5) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted, after June 1, 1935, by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or the revocation of such license."

member of the Board of Directors. He is appointed as head of the religious community by the Superior General of the order—presently a Belgian citizen residing in Rome—on the recommendation of the Provincial Superior, the head of the New Orleans Province of the Society. The Rector has the power to appoint one to three members of the Board of Directors and to submit a list of names to the Provincial Superior, from which list the latter appoints the other three leaders of the religious community, who ex officio become officers of the corporation and members of the Board. Transfers and assignments of priests belonging to the religious community at Loyola, with the exception of the Rector, are controlled by the Provincial Superior, who is an American citizen.

In support of appellant Noe's position language is cited from our opinion in *WOKO, Inc.* v. *Federal Communications Commission*, 80 U.S.App.D.C. 333, 338, 153 F.2d 623, 628 (1946), to the effect that Section 310(a) was directed against "corporations which have an alien tinge." Furthermore Noe contends that, on the basis of the Commission's opinion in *Kansas City Broadcasting Co.*, 5 PIKE & FISCHER R.R. 1057 (1952), the purpose of the section is "to safeguard the United States from foreign influence in the field of radio. . . ." *Id.* at 1093. The emphasis that the appellant places on "alien tinge" and "foreign influence" is misplaced, however. In a letter of March 22, 1932, to the Chairman of the Senate Interstate Commerce Committee, the Secretary of the Navy stated that –

> "[T]he lessons that the United States had learned from the foreign dominance of the cables and the dangers from espionage and propaganda disseminated through foreign-owned radio stations in the United States prior to and during the war brought about the passage of the Radio Act of 1927 [superseded by the Communications Act of 1934], which was intended to preclude any foreign dominance in American radio. . . ."

Quoted in *Hearings on H. R. 8301 Before the House Committee on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 26 (1934). In these same hearings, Captain Hooper, Director, Communications Division, Office of Naval Operations, remarked that—

> "'Due to the lessons of the World War, the Navy Department . . . recommended Government ownership of all radio. Congress did not approve this, but in lieu thereof enacted legislation requiring private ownership and operation, with positive assurance that radio would be owned by United States citizens, that directors and officers of radio companies would be United States citizens, and that four fifths of the stock would be in the hands of United States citizens. . . .'"

Id. at 23. See also S.Rep.No. 781, 73d Cong., 2d Sess. 7 (1934). From this legislative history we may conclude that although Section 310(a) was directed against alien control of our communications facilities, this limitation was primarily based "upon the idea of preventing alien activities against the Government during the time of war." 68 Cong.Rec. 3037 (1927). The relationship of Loyola to the Society of Jesus hardly seems to endanger our national security. Certainly the mere fact that the Rector is appointed by an ecclesiastical superior who is an alien is not enough to bring Loyola within the interdiction of the cited statute.

We recognize that the Society of Jesus is an hierarchical organization, and that within the organization some power and control is vested in persons who are not directly a part of the University or the corporation, and a few of whom reside abroad. But the record shows that this hierarchical chain of authority—which extends from the Superior General in Rome to the Provincial Superior and the Rector, and in some rare situations might include the Pope—has never been used in the past to impinge upon the independence of the University in the operation of its radio station. Under all the circumstances, even

if Section 310(a) be thought to have a semblance of relevance to the present case, it nevertheless would be inapplicable since it was incorporated in the Communications Act to "guard against alien control and not the mere possibility of alien control." S.Rep.No. 781, 73d Cong., 2d Sess. 7 (1934). In sum, therefore, we find nothing in the legislative history of the statutory provisions, or in the record of the present case, which would require us to overrule the Commission's rejection of Noe's argument. Loyola seems to us to fall neither within the letter nor the spirit of the statute.

Turning to other aspects of the case, we note that the chain of authority within the Society of Jesus, described above, is primarily an ecclesiastical one, though it includes the power to appoint and promote. This latter power, in business organizations, might perhaps require all persons in positions of comparable appointing authority to be considered as principals in an application for a TV license, though that issue is not now before us. See *WLOX v. Federal Communications Commission*, —— U.S. App.D.C. ——, —— F.2d —— (decided September 18, 1958). The officers and directors of Loyola are not men of business; they are leaders of a religious community. In previous comparative hearings, the Commission has always recognized the necessity of distinguishing non-business organizations from the ordinary stock corporation. See *Toledo Blade Co.*, 15 PIKE & FISCHER R.R. 739, 816 (1958) (non-stock, non-profit, trade union ownership of corporation); *City of Jacksonville*, 12 PIKE & FISCHER R.R. 113, 189r (1956) (municipal corporation); *Gulf Coast Broadcasting Co.*, 10 PIKE & FISCHER R.R. 779 (1954) (Baptist General Convention of Texas); *Kansas City Broadcasting Co.*, *supra* at 1079-80 (Reorganized Church of Jesus Christ of Latter Day Saints); *cf. Port Arthur College*, 14 PIKE & FISCHER R.R. 1234, 1253-54 (1957) (college controlled by Board of Trustees). We therefore see no impropriety in the Commission's differentiating the educational and religious organization involved in

the present case from the usual business corporation, in applying its customary comparative criteria.

The briefs of appellant and the amicus make reference to Loyola's failure initially to provide time on the programs of its radio station, WWL, for local Protestant clergymen. Amicus quotes from a recent papal encyclical to the effect that television programs should not contain anything "which is contrary to the Catholic faith,"[3] and concludes that Loyola's actions together with the encyclical indicate a conscious anti-Protestant policy. It argues that the awarding of the TV license will therefore violate the First Amendment. We note, however, that at the time when Station WWL failed to provide time for local Protestant clergymen, it nevertheless carried a one-hour network program on Sunday morning which was utilized by Protestant clergymen elsewhere. Furthermore, the Commission found that this failure to provide time for local Protestant clergymen was not the result of a policy of not making such time available, and that time was provided as soon as the situation was brought to the attention of Loyola's President. The fact that Loyola is a Catholic University is not an independently significant factor for comparative consideration. *Cf. Toledo Blade Co., supra* at 830-31 (1958) (applicant almost wholly owned by trade union groups). The religious orientation of a licensee is an irrelevant factor. As the Commission has held, the prime consideration is "whether the applicant, whatever his own views, is likely to give a 'fair break' to others who do not share them." *WBNX Broadcasting Co.*, 12 F.C.C. 837, 841, 4 PIKE & FISCHER R.R. 242, 248 (1948). The license which is here at stake, and which has been granted to Loyola, is a license to operate a commercial television station, in competition with other commercial stations. The pro-

[3] His Holiness Pope Pius XII, Encyclical Miranda Prorsus, September 8, 1957, para. 130; see *id.*, para. 216.

grams which Loyola has informed the Commission it intends to offer are comparable to those generally offered by other commercial stations. The Commission has satisfied itself, on an adequate record, that Loyola will fulfill the broadcast needs of the community. Under these circumstances there can be no First Amendment objection that would constitute a bar to the grant of a license to Loyola. See *Kansas City Broadcasting Co., supra* at 1095-96. Of course should Loyola in the future fall short of the rules and regulations of the Commission in regard to proper programming, the Commission may always review the matter in a renewal proceeding or otherwise. See *Trinity Methodist Church, South* v. *Federal Radio Commission*, 61 App.D.C. 311, 62 F.2d 850 (1932), cert. denied, 288 U.S. 599 (1933).

The brief of amicus curiae also urges that Loyola is an "instrumentality of the Holy Roman Pontificate," and that the latter is a foreign sovereignty and "the true beneficiary of the proposed grant." The grant, it says, would be contrary to the public policy of the United States and adverse to its sovereignty. To the extent that these contentions duplicate the arguments considered above, we need not discuss them further. To the extent that they differ from those arguments, they are unsupported in the present record, were not presented to the Commission, and are not, strictly speaking, appropriate for our consideration. Nevertheless, we have considered them. We find nothing therein which would lead us to hold that the Commission's determination of the issues before it was clearly wrong or contrary to law.

After consideration of the record presented to us—including the examiner's recommendation, the Commission's decision, and its amended decision on reconsideration—we are satisfied that as to each point raised by appellant Noe, the Commission evaluated the record facts within the framework of its standard comparative criteria and

with proper regard to its statutory mandate. We are satisfied further that the Commission's conclusion awarding the license to Loyola was based on a careful and reasoned weighing of the various points of preference awarded between Noe and Loyola, in accordance with governing law.[4] Under the circumstances, the court will not superimpose its own evaluation of the facts to upset the balance struck by the Commission. See *Tampa Times Co. v. Federal Communications Commission*, 97 U.S.App. D.C. 256, 230 F.2d 224 (1956); *McClatchy Broadcasting Co. v. Federal Communications Commission*, 99 U.S.App. D.C. 195, 239 F.2d 15 (1956), cert. denied, 353 U.S. 918 (1957).

No reversible error appearing, the order of the Commission will be

Affirmed.

[4] It should be added that the Commission agreed with the hearing examiner that the appellant Noe was unqualified financially. However, the Commission proceeded alternatively to consider Noe comparatively as if it were qualified. Without expressing an opinion on the position of both the Commission and the examiner that Noe was not financially qualified, we have assumed here for purposes of our decision that it was so qualified.

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No. 465

In the Supreme Court of the United States

OCTOBER TERM, 1958

JAMES A. NOE, HARRY ALLEMAN, RAYMOND F. HUFFT, and JAMES A. NOE, JR., d/b/a JAMES A. NOE & COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

VICTOR R. HANSEN,
Assistant Attorney General,
Department of Justice,
Washington 25, D. C.

JOHN L. FITZGERALD,
General Counsel,

RICHARD A. SOLOMON,
Assistant General Counsel,

RUTH V. REED,
Counsel,
Federal Communications Commission,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 643

JAMES A. NOE, HARRY ALLSMAN, RAYMOND F. HUFFT, and JAMES A. NOE, JR., d/b/a JAMES A. NOE & COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 260 F.2d 739. The decision and order (R. 377-542) of the Federal Communications Commission, and its opinion denying rehearing (R. 543-551), have not been officially reported but are reported unofficially at 12 Pike & Fischer, Radio Regulation 1017 and 1116a.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the action of the Commission, was entered on October 16, 1958. The petition for a writ of certiorari was filed on January 14, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Loyola University, by reason of its relationship to the Society of Jesus, is the "representative" of an "alien" or a corporation whose stock is "owned of record or voted" by "representatives" of aliens, within the meaning of Section 310(a) of the Communications Act, and therefore not legally qualified to be a broadcast licensee.

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*) are set forth in the Petition, pp. 2-3.

STATEMENT

The Federal Communications Commission on July 11, 1956, after a comparative proceeding to determine which of three applicants was best qualified to operate a commercial television station on Channel 4 in New Orleans, Louisiana, granted a construction permit to Loyola University, a Jesuit educational institution in New Orleans (R. 377-542). The Commission concluded that the grant to Loyola would serve the public interest in large part because of the

superiority of its past performance as a radio station licensee in New Orleans (R. 539-541). On June 27, 1957, the Commission affirmed its decision on reconsideration over a contention by petitioner that Loyola was not legally qualified to be a broadcast licensee, under Section 310(a) of the Communications Act, by reason of its connection with the Society of Jesus (R. 543-551).

The Society of Jesus is an order of Roman Catholic priests with a total membership of some 32,000, of whom about 7,500 reside in the United States and about 42 are attached to Loyola University (R. 390, 381). Loyola is a non-profit, non-stock corporation, chartered by the State of Louisiana in 1912, which operates the University and standard broadcast station WWL in New Orleans (R. 381). Under the corporate charter, directors of the corporation—all of whom are American citizens (R. 54-55)—must be priests of the Society of Jesus attached to Loyola University (R. 386-387). The head of the Jesuit religious community at Loyola, the Rector, is *ex officio* President of the University and the corporation and a member of the board of directors (R. 386-387). He is appointed as head of the religious community by the Superior General of the Jesuit Order, presently a Belgian citizen residing in Rome, on the recommendation of the Provincial Superior, an American citizen who is head of the New Orleans Province of the Society (R. 589, 386-387). The Rector has the power to appoint one to three members of the board of directors and to submit a list of names to the Provincial Superior from which list the latter appoints

the other three leaders of the religious community, who *ex officio* become officers of the corporation and members of the board of directors (R. 386-387). Transfers and assignments of priests belonging to the religious community at Loyola, with the exception of the Rector, are controlled by the Provincial Superior (R. 388-389).

In practice, the Loyola corporation operates independently of the Society of Jesus (R. 504-505, 536). Neither the Superior General nor the Provincial Superior has ever attempted to use the power to appoint or transfer to control the University in the operation of its radio station (R. 389). The Loyola corporation does not make reports to the Provincial Superior, does not consult him about actions to be taken, and its board of directors makes all decisions as to corporate activities without any instructions from the Provincial (R. 390). Reports made by Loyola to the Superior General consist of a letter report by the president about twice a year and a financial report by the treasurer once every three years (R. 389). Replies of the Superior General to these reports do not contain suggestions or instructions (*ibid.*). All corporate property belongs exclusively to the corporation, and no other individual or organization has any right, title, or interest in such property (R. 388). The corporation is legally and financially autonomous; it does not support or receive monetary support from the Society of Jesus (R. 596, 608). The Archbishop of the New Orleans Diocese of the Roman Catholic Church has no administrative control over the investments or business activities of the Jesuit Order (R.

389).[1] There is no direct communication between Loyola and other Jesuit communities and institutions in other provinces except at a yearly meeting of the National Catholic Educational Association (R. 391).

At the outset of the comparative proceeding, the Commission found Loyola to be legally qualified to construct and operate a television station (R. 377). Neither petitioner nor any other party sought, in the manner prescribed by the Commission's Rules (47 C.F.R. 1.141), to enlarge the hearing issues to include an issue as to Loyola's legal qualifications (R. 381). However, in connection with its comparative evaluation of the applicants, the Commission found that "Loyola is an independent corporation which, for all practical purposes in this proceeding, is independently owned and operated" (R. 504-505), and further that "the Loyola applicant is independent for legal and practical purposes from the Society of Jesus" (R. 536). On petition for rehearing, the Commission declined to alter its finding that Loyola is legally qualified to be a broadcast licensee, stating that the matters urged by the petitioner had already been considered (R. 548).

The court of appeals unanimously affirmed the actions of the Commission (Pet. App. 1a-9a).[2] Sustain-

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[1] However, expenditures in excess of $50,000 must, by the terms of canon law, be first approved by the "Congress of Religious," an organization of the Roman Catholic Church (R. 390). According to the president of the university, the purpose of this requirement is "so that they don't bring religion into disrepute by getting themselves into debt that they can not liquidate" (R. 613).

[2] Although the Commission found petitioner financially disqualified to receive the television grant, the court below—

ing the Commission's finding that Loyola is for practical purposes independent from the Society of Jesus, the court concluded from the legislative history of Section 310(a) that the ecclesiastical and hierarchical relationship between Loyola and the Society of Jesus did not fall within the Congressional intent of precluding alien ownership of radio facilities to prevent activities against the Government in wartime (Pet. App. 5a, 3a-4a). The court stated (Pet. App. 5a): "Certainly the mere fact that the Rector is appointed by an ecclesiastical superior who is an alien is not enough to bring Loyola within the interdiction of the cited statute." Pointing further (*ibid.*) to the fact that the hierarchical chain of authority "has never been used in the past to impinge upon the independence of the University in the operation of its radio station," the court held (Pet. App. 5a-6a) that even if the Society of Jesus were the type of "alien" contemplated by the statute, the mere possibility of alien control did not make Loyola the "representative" of an alien, within the meaning of Section 310(a), in the absence of any actual control. It concluded (*ibid.*): "Loyola seems to us to fall neither within the letter nor the spirit of the statute."

ARGUMENT

The question presented is narrow, turns on the particular facts, and lacks general importance.

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without expressing an opinion on the Commission's position—assumed for purposes of its decision that petitioner was so qualified (Pet. App. 9a, n. 4).

The holding below is simply that Loyola University is not the representative of an alien within the meaning of Section 310(a) of the Communications Act because of its relation to the Society of Jesus. Far from opening the door to the possibility that the ownership and control of American broadcast facilities will rest in the hands of non-citizens, the court of appeals merely concluded that a unique and primarily ecclesiastical relationship falls within neither the spirit nor the letter of Section 310(a). Taking into account "all the circumstances" (Pet. App. 5a), including the possibility of some alien control implicit in the hierarchical organization of the Society of Jesus and the fact that this chain of ecclesiastical authority "has never been used in the past to impinge upon the independence of the University in the operation of its radio station", the court sustained the Commission's finding that Loyola is for practical purposes independent of the Society of Jesus, and held that there is no alien control of broadcast facilities here (Pet. App. 5a-6a).

Petitioner's contention (Pet. 12-20) that the court below has erroneously restricted Section 310(a)'s prohibition against alien ownership or control ignores the factual determination that Loyola is not the representative of an alien. Asserting that Congress meant to preclude any suggestion of "alien tinge" or possibility of "foreign influence" of any kind, petitioner in effect argues that a finding of independence may not be predicated upon an evaluation of all the circumstances if any one factor would admit of the possibility of alien control. The court of appeals

properly rejected this unduly restrictive view of the legislative intent as "misplaced" (Pet. App. 4a-5a).

As the decision below points out (Pet. App. 5a), while Section 310(a) is directed against alien control of broadcast facilities, it is primarily based "upon the idea of preventing alien activities against the Government during the time of war" (68 Cong. Rec. 3037). See also, S. Rep. No. 781, 73rd Cong., 2d Sess., p. 7; Hearings on S. 2910 before the Senate Committee on Interstate Commerce, 73rd Cong., 2d Sess., pp. 122-135, 164-173; Hearings on H.R. 8301 before the House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess., pp. 23-28, 102-104. Moreover, the section was incorporated in the Communications Act to "guard against alien control and not the mere possibility of alien control" (S. Rep. No. 781, *supra*, p. 7). There is nothing in the legislative history of Section 310(a) which conflicts with the appellate determination, made upon full review of all the facts and circumstances shown on the record rather than by any artificial test,[3] that Loyola's ecclesiastical relation to the Society of Jesus is not such as to make it the representative of an alien within the meaning of Section 310(a). There is no conflict of decisions, and petitioner's disagreement with the weight to be accorded particular circumstances affords no basis for further review by this Court. *Pittsburgh Steamship Company* v. *National Labor Relations Board*, 340 U.S. 498, 502-503.

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[3] See *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 144-146; H. Rep. No. 1850, 73rd Cong., 2d Sess., p. 5.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

VICTOR R. HANSEN,
Assistant Attorney General.

JOHN L. FITZGERALD,
General Counsel,

RICHARD A. SOLOMON,
Assistant General Counsel,

RUTH V. REEL,
Counsel,
Federal Communications Commission.

FEBRUARY 1959.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 643

JAMES A. NOE, HARRY ALSMAN, RAYMOND F. HULTT, and JAMES A. NOE, JR., doing business as JAMES A. NOE AND COMPANY, *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*,

LOYOLA UNIVERSITY, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT BELOW IN OPPOSITION TO ISSUANCE OF THE WRIT

Paul M. Segal
Robert A. Maginnis
816 Connecticut Ave.
Washington, D.C.

Of Counsel:

Charles L. Dunckhauer, Jr.
American Bank Building
New Orleans, Louisiana

Attorneys for Respondent

Dated: January 12, 1959

Press of Byron S. Adams, Washington, D.C.

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IN THE

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FEDERAL COMMUNICATIONS COMMISSION, *Respondent,*

LOYOLA UNIVERSITY, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT-BELOW IN OPPOSITION TO ISSUANCE OF THE WRIT

OPINIONS BELOW

The opinion of the Court of Appeals (Petitioner's Appendix pp. 1a-9a) is reported at 260 F. 2d 739. The decision of the Federal Communications Commission granting the construction permit to Loyola University (J.A. 377-542) was released July 13, 1956, and is reported at 12 Pike & Fischer, Radio Regulation 1017. A Memorandum Opinion and Order of the Federal Communications Commission that de-

nied petitions for rehearing (J.A. 543-551) was released July 1, 1957, and is reported at 12 Pike & Fischer, Radio Regulation 1116a.

JURISDICTION

The jurisdictional considerations are set forth in the Petition, page 2.

QUESTION PRESENTED

The question presented is whether or not Loyola University, by reason of its connection with the Society of Jesus, is the representative of an alien or is a corporation whose stock is owned of record or voted by representatives of aliens, within the meaning of Section 310(a) of the Communications Act of 1934, 48 Stat. 1086 (1952), as amended, 47 U.S.C., § 310(a), and therefore rendered ineligible to hold a television license. The statute involved is set forth in the Petition, pages 2 and 3.

STATEMENT

Loyola University, James A. Noe and Company, and The Times-Picayune Publishing Company were three separate applicants for the same television facility in New Orleans, Channel 4. Because of mutual exclusivity of the applications, the FCC designated the three applications for a comparative hearing to determine which applicant would best serve the public interest, convenience, and necessity. At the time of the hearing, each of the applicants had a license from the FCC for one or more broadcast facilities in the State of Louisiana. In the case of James A. Noe and Company, it was Mr. Noe who was the licensee of a standard broadcast (radio) station in New Orleans. The Times Picayune

Publishing Company and Loyola University each was the licensee of a standard broadcast station in New Orleans. Therefore, the past broadcast records of each applicant played an important part in the comparative determination as to which one of them would best serve the public interest.

Loyola University has operated a commercial broadcast station in New Orleans since 1922. The FCC determined that Loyola University had a past broadcast record superior to either of the other applicants. Past performance of an applicant has been one of the most important criteria used by the FCC to evaluate promises of applicants for new facilities. In the case of Loyola, it was the same corporate entity, Loyola University, a Louisiana corporation, which had held licenses for standard broadcast station WWL for many years, that was applying for a construction permit for a television station. The applicants competing with Loyola University argued that, as a comparative matter, Loyola University suffered because of its organizational characteristics as an educational institution. The FCC considered the alleged comparative demerits and the argument submitted. Additionally, the FCC considered the argument which the petitioner now attempts to use as the grounds for a petition for certiorari. The FCC held that Loyola University was not within that class of persons and entities proscribed from holding a license from the FCC under Section 310(a) of the Communications Act.

Loyola University is a corporation duly established by the laws of the State of Louisiana, domiciled in New Orleans. The University's history dates back to the middle part of the Nineteenth Century (R. 245). Its present charter dates back to 1912.

Loyola University is governed by its Board of Directors, all of whom are native-born citizens of the United States. The record is devoid of any fact which could tend to show any external control, at any time, over a director or officer. There are four corporate officers —a President, Vice-President, Secretary, and Treasurer. Under the present charter, which was filed as part of Loyola's application, each of the officers and directors must be a member of the Society of Jesus. The Court of Appeals for the District of Columbia Circuit recognized the ecclesiastical organization of the Society of Jesus as it pertains to this case. However, the Court found that the record shows that this chain of religious authority has never been used to impinge upon the independence of the University in the operation of its radio station.

ARGUMENT

The petitioner contends that this case presents an important question regarding foreign influence in communications which has not been settled by this Court. Loyola University maintains that there is no "foreign influence" in the record. Petitioner maintains this case is different from other cases involving religious organizations as licensees of the FCC. The only difference in this case is that it would appear that the Catholic religion is involved rather than some other religion. Petitioner maintains that the legal issue here is no different than an instance of a corporate creation of a labor organization, having a majority of members outside of the United States, applying for a facility from the FCC. This comparison is hardly apt. The only points in common among members of the Jesuit Order deal with religious obliga-

tions. This religious connection, in spiritual matters, is of no concern to the civil law of the United States.

The applicant here is Loyola University, a corporation of the State of Louisiana. All of its officers and the members of its Board of Directors are native-born citizens of the United States. As a non-profit corporation, having no stock, control over the corporation is vested in the Board of Directors. The Board of Directors votes the only stock interest that the Loyola corporation could be deemed to have. The fact that each of the members of the Board of Directors belongs to a religious organization which has or could have a majority of members outside the United States is no more in point than the fact that a member of the Rotary International belongs to an organization of which the majority of members are not United States citizens. Petitioner goes too far when he maintains by implication that this case, as decided by the Court of Appeals, stands for the proposition that ownership and control of facilities licensed by the FCC can be in the hands of non-citizens. As pointed out, the facility in question herein is in the hands and in the control of a Louisiana corporation, not a group of aliens non-resident in the United States.

The FCC made findings that the Society of Jesus has no control over the television station proposed by Loyola University. Petitioner seeks to attack the findings made by the FCC without showing error. This cannot be done in this Court because of the inclination of all courts to give great weight to any Commission finding on the question of control. *Rochester Telephone Corporation* v. *United States*, 307 U.S. 125, 83 L. ed. 1147.

Petitioner maintains that the Court of Appeals has judicially legislated an amendment to Section 310 (a) of the Communications Act. This is not the case and no reading, however strained, can warrant this conclusion.

Petitioner misinterprets the argument of the intervenor at pages 9 and 10 of the intervenor's brief before the Court of Appeals. In the petition, Noe argues, pp. 13-14, that the intervenor did not maintain that the Congressional purpose in the enactment of Section 310 (a) was limited to prevention of alien activities against the Government during time of war. The petitioner has overlooked the argument of intervenor set forth at page 8 of the intervenor's brief before the Court of Appeals:

> "The provisions of Section 310 (a) have a very precise significance derived from the nature of the communications enterprises of the United States. No country, so far as is known, permits ownership of its communications by non-citizens. This concept is inherent in the very nature of the *search for national security.*" (emphasis supplied)

The argument of the petitioner breaks down in that nothing in the record shows that the members of the Board of Directors of Loyola University, a Louisiana Corporation, are representatives of aliens. Petitioner confuses religious beliefs with civil authority. The discipline and hierarchical control, referred to by petitioner, page 19, relate to religious matters only. Petitioner maintains that, even if the Superior General of the Jesuit Order were an American citizen, the fact that less than half of the total membership of the Jesuit Order are American citizens would militate against a grant of the license to Loyola University because of a

"predominantly foreign complexion of the Order given by its membership". It is the Petitioner's argument that the Society of Jesus, headed by the Superior General, is the applicant for this facility rather than a Louisiana corporation, all of whose officers and directors are natural-born citizens of the United States. The argument made by petitioner has no basis in fact.

CONCLUSION

The decision of the United States Court of Appeals for the District of Columbia Circuit is correct. No important issue is presented for review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

PAUL M. SEGAL
ROBERT A. MARMET
815 Connecticut Ave.
Washington 6, D. C.
Attorneys for Respondent

Of Counsel:

CHARLES I. DENECHAUD, JR.
American Bank Building
New Orleans, Louisiana

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